UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

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Director, Defense Accounting and Auditing Division

Attached memorandum of May 13, 1964, with enclosures, from the Seattle Regional Office entitled "Review of cost of electricity purchased by Air Force at Paine Field, Washington (Code 57242)," concerns the legality and enforceability of similar provisions in a Quit Claim Deed and lease-purchase agreement obligating the Air Force to purchase its electricity from the grantor and lessor (Snohomish County, Washington), respectively, so long as the County sells electricity at rates no greater than otherwise available through the local Public Utility District. Also, the inquiry concerns the legality and enforceability of the Government's obligation under the lease-purchase agreement to receive and treat the County's sewage without charge under the conditions therein specified.

Under the Quit Claim Deed executed on August 15, 1955, the County for a consideration of $605,000 conveyed to the United States 339.45 acres, more or less, subject to certain exceptions and reservations including the following:

> "e. The United States agrees to purchase all its electrical requirements from Grantor so long as a contract exists between the Snohomish County Public Utility District and Grantor concerning the purchase and resale of electricity on Paine Field, provided the Grantor will sell to the United States electricity at rates no greater than otherwise available through the Snohomish County Public Utility District, so long as a contract between the Snohomish County Public Utility District and the Snohomish County Airport exists. The United States Air Force shall not be prohibited from generating any or all of its own electrical requirements, provided the Air Force will purchase any additional electrical requirements over and above that generated from the Grantor, Grantor will guarantee to the United States that, in the event a power connection to the Paine Field system would be more expensive by reason of additional length of line than a connection to Public Utility District system, Grantor will meet

such additional expense. It is understood that such new connection will be limited to certain pre-established primary service points, not to exceed one point on the South and West and North sides of Paine Field, said point to be established at the convenience of the United States and with the concurrence of the Grantor."

Under the lease-purchase agreement No. DA-45-108-eng-3370, executed August 15, 1955, the County leased to the United States two tracts of land (41-1, 41-2), containing 198.89 and 1.42 acres, more or less, respectively, at an annual rental of $42,000. By supplemental agreement No. 1 dated May 6, 1957, the original agreement was amended to increase the leased area and to permit lessor 120 days to vacate following notice of the Government's intention to exercise the purchase option. The lease provides for an original term beginning August 16, 1955, through June 30, 1956, "provided that unless and until the Government shall give notice of termination in accordance with provision 6 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and provided further that this lease shall in no event extend beyong August 16, 1965."

Paragraph 7 obligates the Government, subject to the conditions therein stated, to maintain and operate, so long as the Air Force has a requirement, all sewage facilities lying within its leased and purchased areas and to receive and treat all sewage except industrial waste, without charge to the County, arising from the operation of 16 of the lessor's designated buildings.

Paragraph 9 contains provisions similar to those in the Quit Claim Deed quoted above obligating the Government to purchase all of its electrical requirements from the lessor unless the "Air Force" should generate its own electricity. Paragraph 12 under the heading "OPTION PROVISIONS" contains an agreement on the part of the lessor to convey the leased land to the United States subject to the conditions therein stated. In the event of such conveyance, paragraph 13a under the same heading would reserve to the lessor the right to use existing sewage disposal facilities jointly with the Government and the Government would be obligated to maintain and operate such facilities so long as

the Government has a requirement therefor and to receive and treat, without charge, all of the County's sewage arising from the operation of 16 of its designated buildings. Also, in the event of such conveyance under the provisions of paragraph 14 which are identical to the provisions of paragraph 9, the Government would be obligated to purchase all of its electrical requirements from the lessor unless the "Air Force" should generate its own electricity.

Paragraph 15 sets the purchase price of the property at $420,000. Further, it provides that all rentals paid under the terms of the lease shall be applied against the stipulated purchase price and that the lessor will convey the leased lands to the Government when rentals in the total amount of $420,000 shall have been paid.

It is stated in the memorandum of May 13, 1954, that the electricity purchased by the County for resale is sold to the Air Force at rates which are approximately 30 percent greater than rates paid by the County even though the County incurs no additional expense in delivering the electricity to the Air Force; that this mark-up amounts to about $20,000 annually; and that the Bonneville Power Administration has advised that it would be in a position to deliver power directly to the Air Force Base at Paine Field at a substantial reduction in cost.

As to the legality of the lease-purchase agreement and the current rental payments accruing thereunder attention is invited to attached copy of acquisition report (Project No. 330), submitted to the Committees on Armed Services of the Senate and House of Representatives in compliance with the requirements of Public Law 155, 83rd Congress, 65 Stat. 336, 365, 10 U.S.C. 2662, wherein the act of August 18, 1890, 26 Stat. 316, as amended 50 U.S.C. 171 (now 10 U.S.C. 2663) is cited as authority for such acquisition. In the circumstances, the inhibition in the rider contained in the Independent Offices Appropriation Act for the fiscal year ending June 30, 1959, Public Law 85-844, , 72 Stat. 1067, Title I, against the use of appropriated funds for the payment for sites, etc., by lease-purchase contracts may not be regarded as applicable to the involved lease-purchase agreement. B-136524, June 1, 1959. Also, Cf. 38 Comp. Gen. 703, 706.

With respect to the automatic renewal option in the lease-purchase agreement your attention is directed to attached copy of our decision of April 22, 1943, B-33725, to the Secretary of War concerning the

proposed execution of leases for indefinite terms, terminable by the Government on 30 days written notice and containing automatic renewal clauses not to extend to occupancy beyond six months after the unlimited National Emergency as declared by the President in Proclamation 2487, dated May 27, 1941. After noting that the execution of such leases is not entirely free from doubt in view of the provisions of sections 3679 and 3732, Revised Statutes (31 U.S.C. 665 and 41 U.S.C.11), the Secretary was advised that if he should determine that the execution of such leases was necessary incident to the prosecution of the war, our Office would not question otherwise proper payments thereunder, subject however, to the understanding that prior to the beginning of each fiscal year a determination would be made as to whether other suitable space could be leased at a lower rental.

The national emergency as declared by the President in Proclamation 2487, dated May 27, 1941, was terminated on April 28, 1958, by Proclamation 2974, 17 F.R. 3813, 50 U.S.C.A., Appendix, note preceding section 1; Werner v. United States, 233 F. 2d 52. Accordingly, the decision of April 22, 1943, may not be regarded as authorizing the execution of leases with automatic renewal options after April 28, 1958, and in the absence of express statutory authority therefor such options are not authorized under normal circumstances since they fall "squarely within the inhibition contained in the statutes [sections 3732 and 3679, Revised Statutes]." 28 Comp. Gen. 553; B-90141-O.M., December 14, 1949. In the present instance, however, since under the terms of paragraph 15 of the lease the annual rental payments of $42,000 are to be applied against the purchase price of $420,000 and since it is understood that the Air Force intends to exercise the purchase option and has reported the lease-purchase agreement to the Committees on Armed Services as required by 10 U.S.C. 2662, the legality of the lease should not be questioned with respect to the automatic renewal option, particularly in view of the proximity of the termination date.

As to the provisions in the two instruments requiring the Government to purchase all of its electrical requirements from the grantor and lessor, there is a general limitation of ten years on the duration of public utility contracts. 40 U.S.C. 481(a)(3). By delegation of authority of October 11, 1954 (filed October 13, 1954),

19 F.R. p. 6665, the Administrator of General Services, acting under the cited statutory authority, delegated to the Secretary of Defense authority to enter into public utility service contracts (power, gas, water and communications) for periods not exceeding ten years.

While the lease stipulates that the term shall not extend beyond August 16, 1965, ten years from the beginning of the term, as indicated above the purchase option if exercised by the Government will subject the Government to a continuing unlimited obligation, except as therein provided, to purchase all of its electrical requirements from the County. Therefore, the provision in paragraph 14 of the lease-purchase agreement obligating the Government to purchase all of its electrical requirements from the County for an indefinite term must be regarded as in contravention of 40 U.S.C. 481(a)(3) and the delegation of authority of October 11, 1954. Also, the Government's continuing indefinite obligation under paragraph 13a to receive and treat without charge, all of the County's sewage, except industrial waste emanating from the County's designated buildings must be regarded as in contravention of 41 U.S.C. 11, 31 Id. 665(a); Id. 712a. 42 Comp. Gen. 272. For the reasons stated in the next-to-last paragraph of the cited decision, however, and because in this particular instance the Government's undertaking furnished part of the consideration for the purchase option in favor of the Government's option to purchase and the possibility that any affirmative audit action might operate to nullify such purchase option, we suggest that audit action in the matter be confined to the report referred to in the last paragraph of the memorandum of May 13, 1954.

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